MAJLIS PEGUAM MALAYSIA v. AJMAIN ABD RAHIM

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
MARY LIM JCA
HANIPAH FARIKULLAH JCA
[CIVIL APPEAL NO: W-02(A)-2080-10-2017]
22 APRIL 2019

LEGAL PROFESSION: *Disciplinary proceedings – Professional misconduct – Standard of proof – Allegation that advocate and solicitor misappropriated client's money in legal firm's client's account – Disciplinary Committee found advocate and solicitor guilty and Disciplinary Board struck his name off Roll of Advocates and Solicitors – Standard of proof required in disciplinary proceedings concerning professional misconduct – Whether beyond reasonable doubt – Legal Profession Act 1976, s. 94(2)*

EVIDENCE: *Standard of proof – Legal profession – Allegation that advocate and solicitor misappropriated client's money in legal firm's client's account – Disciplinary Committee found advocate and solicitor guilty and Disciplinary Board struck his name off Roll of Advocates and Solicitors – Standard of proof required in disciplinary proceedings concerning professional misconduct – Whether beyond reasonable doubt*

Messrs Abdul Aziz & Associates ('the firm') had acted for one Nik Suhaidi in a land transaction where the latter was a vendor. According to Nik Suhaidi, the firm had misappropriated part of his balance purchase price of RM75,835.52 to pay off its judgment debt to Permodalan Kemajuan Negeri Selangor ('PKNS'). This prompted Nik Suhaidi to lodge a complaint with the Bar Council ('appellant') against one Asmadi, a partner in the firm. The appellant's Disciplinary Board ('DB') decided to include the respondent, another partner of the firm, as one of the respondents to the complaint and, following that, a Disciplinary Committee ('DC') was convened. Nik Suhaidi later withdrew his complaint voluntarily and without any conditions. However, the appellant proceeded with the complaint and concluded that the respondent, as one of the signatories of the firm, was culpable for the conversion of (i) Nik Suhaidi's funds to pay PKNS; and (ii) PKNS funds received into the client's account in AmBank ('AmBank CA'). The DC further recommended to the DB that the respondent be struck off the Roll of Advocates and Solicitors, pursuant to s. 94(2) of the Legal Profession Act 1976. The DB affirmed the findings and accepted the recommendations of the DC and, subsequently, the respondent was struck off the Roll. Aggrieved, the respondent commenced an action at the High Court to set aside the decision of the DB. The respondent submitted that the DC failed to appreciate that the respondent (i) had ceased to be a partner of the firm from 1 May 2011 and denied responsibility for the remittance of RM75,837.67 out of the AmBank CA to PKNS; and (ii) did not sign the remittance form

as the signature was forged and this was supported by the evidence of an expert witness ('William') who testified that there were differences between the signature on the remittance form and the specimen of the respondent's signature. At the conclusion of the trial, the High Court held in favour of the respondent. Hence, the present appeal.

Held (dismissing appeal)
Per Mary Lim JCA delivering the judgment of the court:

(1) The DC did not address William's evidence in terms of the standard of proof. This was fortified by its findings that (i) the respondent did not close the AmBank CA but remained an undisclosed partner controlling the AmBank CA while ostensibly having joined another firm as a partner; (ii) the respondent only challenged his signature on the application remittance form but completely failed to challenge his signature on the other remittance application forms; (iii) the comparison of the signatures on both forms showed, beyond doubt, that they were the same; and (iv) the respondent did not challenge the signatures drawn on the AmBank CA withdrawing funds from the same after 1 May 2011. It appeared that the DC was putting the burden on the respondent to prove his innocence, beyond reasonable doubt, when the law was the other way round. The evidence was clear that it was Asmadi who had not disputed the receipt and who had admitted to borrowing the money; not the respondent. As far as the respondent was concerned, the question was whether it was his signature on the relevant application remittance form. (paras 34-36)

(2) Handwriting experts, like all experts, are witnesses of opinion and views, as opposed to being witnesses of fact. The DC was not, or at least, it was not established that its members had similar expertise or were capable of such reliable opinion. In any case, their opinion that the signatures of the respondent and one other partner, on both forms, showed beyond doubt that they were the same, was irrelevant as those forms were not the forms in contention. The finding of misconduct was focused on the admission of the misappropriation of RM75,837.67. There were affirmative and strong conclusions by William. The expert report had created a doubt on the respondent's signature on the application remittance form. Since the DC's findings on culpability relied on the respondent's signature on the application remittance form, the DC's findings were unsustainable and the subsequent reliance by the DB was clearly misplaced. (paras 37, 40 & 41)

Bahasa Malaysia *Headnotes*

Tetuan Abdul Aziz & Associates ('firma') bertindak mewakili seorang bernama Nik Suhaidi dalam satu transaksi yang Nik Suhaidi adalah penjual. Menurut Nik Suhaidi, firma menyalahgunakan sebahagian baki harga belian miliknya berjumlah RM75,835.52 untuk membayar hutang penghakimannya pada Permodalan Kemajuan Negeri Selangor ('PKNS'). Ini mendorong Nik

Suhaidi membuat aduan pada Majlis Peguam ('perayu') terhadap seorang bernama Asmadi, rakan kongsi firma. Lembaga Tatatertib ('LT') perayu memutuskan untuk memasukkan responden, seorang lagi rakan kongsi firma, sebagai salah seorang responden untuk aduan dan, berikutan itu, satu Jawatankuasa Tatatertib ('JT') ditubuhkan. Nik Suhaidi kemudian, secara sukarela, menarik balik aduannya tanpa apa-apa syarat. Walau bagaimanapun, perayu meneruskan mendengar aduan dan menyimpulkan responden, selaku salah seorang penandatangan firma, bersalah atas konversi (i) wang Nik Suhaidi untuk membayar PKNS; dan (ii) dana PKNS yang diterima dalam akaun anak guam di dalam AmBank ('AmBank CA'). Jawatankuasa Tatatertib seterusnya mencadangkan kepada LT agar responden disingkirkan daripada Daftarai Peguam Bela dan Peguam Cara, bawah s. 94(2) Akta Profesion Guaman 1976. Lembaga Tatatertib mengesahkan dapatan-dapatan ini dan menerima cadangan JT dan, akibatnya, responden disingkirkan daripada Daftarai. Terkilan, responden memulakan satu tindakan di Mahkamah Tinggi untuk mengetepikan keputusan LT. Responden menghujahkan JT gagal mempertimbangkan responden (i) bukan lagi rakan kongsi firma sejak 1 Mei 2011; dan (ii) tidak menandatangan borang kiriman wang kerana tandatangan tersebut dipalsukan dan ini disokong oleh keterangan saksi pakar ('William') yang memberi keterangan terdapat perbezaan antara tandatangan yang tertera pada borang kiriman wang dan spesimen tandatangan responden. Pada penutup perbicaraan, Mahkamah Tinggi memutuskan berpihak pada responden. Maka timbul rayuan ini.

Diputuskan (menolak rayuan)
Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

(1) Jawatankuasa Tatatertib tidak mempertimbangkan keterangan William dari segi standard pembuktian. Ini diperkuat lagi dengan dapatan bahawa (i) responden tidak menutup AmBank CA tetapi kekal sebagai rakan kongsi yang tidak didedahkan, yang mengawal AmBank CA sementara, kononnya, menyertai firma lain sebagai rakan kongsi; (ii) responden hanya mencabar tandatangannya pada borang permohonan kiriman wang tetapi gagal mencabar tandatangannya pada lain-lain borang permohonan kiriman wang; (iii) perbandingan tanda tangan pada borang-borang yang ditunjukkan, tidak diragui, kedua-duanya sama; dan (iv) responden tidak mencabar tandatangan yang tertera pada pengeluaran dana AmBank CA selepas 1 Mei 2011. Kelihatan seperti JT meletakkan beban pada responden untuk membuktikan dia tidak bersalah, melampaui keraguan munasabah, sedangkan undang-undang menuntut sebaliknya. Keterangan jelas bahawa Asmadi yang tidak mempertikai penerimaan dan dia mengaku meminjam wang; bukan responden. Berkenaan responden, soalannya adalah sama ada tandatangannya yang tertera pada borang permohonan kiriman wang yang relevan.

(2) Para pakar tulisan, seperti semua pakar, adalah saksi pendapat dan

pandangan, berbanding saksi fakta. Jawatankuasa bukan atau, setidak-tidaknya, tidak terbukti ahli-ahlinya mempunyai kepakaran serupa atau berkebolehan mengeluarkan pendapat yang boleh dijadikan sandaran. Dalam apa-apa jua kes, pendapat mereka bahawa tandatangan responden dan seorang lagi rakan kongsi, tertera pada kedua-dua borang, menunjukkan melampaui keraguan bahawa kedua-duanya sama, tidak relevan kerana borang-borang tersebut tidak menjadi pertikaian. Dapatan salah laku fokus pada pengakuan salah guna RM75,837.67. Terdapat kesimpulan afirmatif dan kuat oleh William. Laporan pakar telah membentuk satu keraguan pada tandatangan responden pada borang permohonan kiriman wang. Oleh kerana dapatan JT tentang kebersalahan bergantung pada tandatangan responden yang tertera pada borang permohonan kiriman wang, dapatan JT tidak boleh dikekalkan dan sandaran terkemudian oleh LT jelas satu salah tanggapan.

Case(s) referred to:

Dinesh Kanavaji Kanawagi & Anor v. Ragumaren N Gopal; Majlis Peguam (Intervener) [2018] 2 CLJ 1 FC ***(refd)***

Gana Muthusamy v. Tetuan LM Ong & Co [1998] 4 CLJ 878 CA ***(refd)***

Keith Sellar v. Lee Kwang Tennakoon & Another Appeal [1980] 1 LNS 36 FC ***(refd)***

Lembaga Tatatertib Peguam-Peguam v. Hoo Lin Coln & Anor [2008] 4 CLJ 317 FC ***(refd)***

Majlis Peguam v. Cecil Wilbert Mohanaraj Abraham [2019] 5 CLJ 139 FC ***(refd)***

Rosli Kamaruddin v. How Hock Sing & Anor [2019] 1 CLJ 478 CA ***(refd)***

Legislation referred to:

Legal Profession Act 1976, ss. 100(1)(b), 103D

Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994, r. 8

For the appellant - Lai Chee Hoe & Phan Yit Leng; M/s Chee Hoe & Assocs
For the respondent - Adnan Seman; M/s Adnan Sharida & Assocs

[Editor's note: For the High Court judgment, please see Ajmain Abd Rahim v. Nik Suhaidi Nik Othman & Anor [2018] 1 LNS 1305 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Mary Lim JCA:

[1] The respondent's appeal against the decision of the Advocates & Solicitors Disciplinary Board made pursuant to s. 103D of the Legal Profession Act 1976 (LPA 1976) was allowed by the High Court. The Bar Council, the second respondent before the High Court who was dissatisfied with the decision of the High Court, appealed. After due consideration of the submissions and the records of appeal, we unanimously affirmed the decision of the High Court for the following reasons.

Salient Facts

[2] By letter dated 10 July 2013, one Nik Suhaidi bin Nik Othman

(Nik Suhaidi), the "original complainant" who was enjoined as the first respondent before the High Court, lodged a complaint with the appellant against one Asmadi Faizal bin Ibrahim (Asmadi), a partner in the law firm of Messrs Abdul Aziz & Associates ("the firm"). The substance of the complaint was that the firm had misapplied his money which is the balance purchase price derived from a sale and purchase agreement of Nik Suhaidi amounting to RM143,851.13 which the firm had received on 28 June 2013 together with late payment costs. The firm had acted for Nik Suhaidi in a land transaction where Nik Suhaidi was the vendor. The land transaction was completed but the firm was alleged to have misappropriated part of the balance purchase price of RM75,835.52 to pay off the firm's judgment debt to Permodalan Kemajuan Negeri Selangor (PKNS). This payment was to stop execution proceedings brought by PKNS against the firm. A statutory declaration was attached to the written complaint. The receipt of the monies was not disputed.

[3] Following Nik Suhaidi's complaint and pursuant to s. 100(1)(b) of the LPA 1976, the Advocates & Solicitors Disciplinary Board (DB) sought a written explanation from Asmadi *vide* letter dated 2 September 2013.

[4] On 17 December 2013, Asmadi provided a written explanation together with "all the relevant documents". The DB sent the explanation to Nik Suhaidi for his comments, if any.

[5] On 21 January 2014, Nik Suhaidi through his solicitors, gave his comments to Asmadi's explanation.

[6] On 21 February 2014, the DB decided to include the respondent before us together with three others, as the respondents to the complaint. A Disciplinary Committee (DC) was subsequently convened to investigate into the complaint, now made against the respondent and four others, namely:

(i) Asmadi Faizal bin Ibrahim of Messrs Abdul Aziz & Associates;

(ii) Ajmain bin Abdul Rahim (previously practising at Messrs Khairul A & Co);

(iii) Nor Azril bin Roselan (previously practicing at Messrs Khairul A & Co);

(iv) Abdul Aziz bin Muhammad Tahir (previously practising at Messrs Abdul Aziz & Associates); and

(v) Siti Asilati binti Basri of Messrs Abdul Aziz & Associates.

[7] By letter dated 7 May 2014, the respondent before us, denied that he was involved, whether directly or indirectly, in the alleged misappropriation of money by the firm.

[8] On 26 May 2014, Nik Suhaidi withdrew his complaint "voluntarily

A and without any conditions".

[9] Pursuant to r. 8 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994, the withdrawal was referred to the Bar Council who decided to nevertheless proceed with the complaint on its own. Thereafter, the DC proceeded with its investigation.

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[10] At the conclusion of its investigation, the DC made the following recommendations to the DB:

> 2. That R2 (Ajmain) was a Partner of the Firm and in the view of the DC, he continued to remain so even though he ostensibly withdrew from the Partnership of Messrs. Abdul Aziz & Associates to join Messrs. Khairul A & Co on 1.5.2011 by reason of the fact that he continued to be one of the signatories to the AmBank CA. Therefore, he is culpable for:
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> (a) The conversion of original complainant's funds in the AmBank CA to pay PKNS; and
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> (b) For the conversion of PKNS fund received into AmBank CA
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> 6. Accordingly, the DC recommend to the DB as follows:
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> 2. R2 be struck off under section 94(2) of the Legal Profession Act 1976 ...

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[11] The DB affirmed the findings and accepted the recommendations of the DC. On 13 January 2012, the DB ordered the name of the respondent before us, to be struck off from the Rolls of the Advocates & Solicitors.

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[12] Aggrieved, the respondent filed an originating summons seeking to set aside that decision of the DB.

Decision Of The High Court

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[13] At the High Court, the appellant submitted that based on contemporaneous documents and certain undisputed facts, the respondent was involved in the misappropriation of the original complainant's monies in the firm's client's account. The undisputed facts that were highlighted and relied on were as follows:

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(i) *Vide* a letter dated 1 July 2013 issued by the firm, the firm admitted that it had decided to appropriate and apply the original complainant's monies towards discharging the firm's debt to Permodalan Kemajuan Negeri Selangor (PKNS);

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(ii) The original complainant's money was taken out from the firm's client's Account No. 023-202-200112-0 maintained at AmBank's branch at

Medan Pasar, Kuala Lumpur;

(iii) Up to 26 May 2014, the sole signatories to the firm's client's account were the respondent and one Nor Azril bin Roselan, with the condition that both were to sign;

(iv) Both the respondent and Nor Azril bin Roselan had signed the remittance form. Their signatures were verified and there was verbal confirmation by one Rosnani and one JC from AmBank at 11.25am on 18 June 2013. Both Rosnani and JC did not attend the DC proceedings as witnesses.

[14] In response, the respondent submitted that he was not guilty of the alleged misconduct because the DC had failed to appreciate that the alleged facts had not been proven beyond reasonable doubt. The DC recorded the following to be the "crux" of his testimony:

(i) that he had ceased to be a partner of the firm with effect from 1 May 2011;

(ii) denied any responsibility for the remittance of RM75,837.67 out of the AmBank CA to PKNS;

(iii) denied that the signature on the application remittance form for the said sum of RM75,837.67 out of the AmBank CA to PKNS was his signature;

(iv) alleged that the signature on the remittance form was forged without pin pointing who had committed the alleged forgery;

(v) in support, he relied on evidence of William Pang who testified that there were differences between the signature on the application remittance form and the specimen signature provided.

[15] At the same time, the DC noted that although the respondent had ceased to be a partner with the firm, he remained as one of two signatories as far as the AmBank CA was concerned. Further, it is noted that William Pang was "frank enough to admit that this was his opinion and that he cannot testify conclusively that it is not R2's signature on the application remittance form (appendix 10) and that at most what he can say is that there appeared to be some difference between R2's specimen signature in the remittance form."

[16] After examining the records and having regard to the standard of proof that had to be met, the learned judge agreed with the respondent. It was the finding of the learned judge that the core issue pertained to the respondent's signature on the remittance form for the sum of RM75,837.67, marked as exh. R2W1D4 before the DC proceedings. This remittance form was for payment out of the AmBank client's account to PKNS. The respondent had denied signing the remittance form, and had claimed that the signature on the

form was forged. The evidence of one William Pang, an expert who the respondent called to testify at the DC hearing, was relied on as proof of this forgery. William Pang testified that based on his analysis of the signatures of the respondent, he noted that there were differences between the signatures on the application remittance form, exh. R2W1D4, and the respondent's specimen signatures given to him.

[17] The learned judge did not find merit in the appellant's argument that although the respondent had only challenged his signature on exh. R2W1D4, there were signatures on other remittance forms, for instance, one for the sum of RM65,000, which stood unchallenged.

[18] The learned judge also did not find merit in the argument that the DC had compared the signatures on both forms and had concluded that it "shows beyond doubt that they are the same" or the undisputed fact that *vide* letter dated 1 July 2013, issued by the firm, the firm had decided to appropriate the original complainant's monies and apply it towards discharging the firm's debt to PKNS. Instead, the learned judge was of the view that since the finding of misconduct centred around the admission to the misappropriation of RM76,000, it is therefore not unreasonable for the applicant to only challenge the remittance form for the sum of RM76,000.

[19] As for the dispute on the authenticity of the respondent's signatures, the learned judge did not find anything in the DC's report of investigation proceedings to the effect that William Pang "cannot say conclusively that the applicant's signatures had been forged. What is before the court is the DC's summary of Mr William Pang's evidence, not his oral testimony." Since the expert report prepared by Mr William Pang was also before the court, Her Ladyship proceeded to examine its contents and found that "supports the applicant's contention that he did not sign the remittance form, exh. R2W1D4."

[20] It was the specific finding of the learned judge that since the standard of proof required is beyond reasonable doubt, the expert report had created a doubt with regards to the respondent's signature on exh. R2W1D4. Given that the DC's finding on the culpability of the respondent was based "on the fact that he continued to be one of the signatories to the AmBank CA", with the creation of "doubt with regards to this signature on exh. R2W1D4", the learned judge concluded that the "findings of the DC is not sustainable." The DB's reliance on the DC's findings was therefore misplaced.

[21] For those reasons, the appeal was allowed by the learned judge.

Our Deliberations And Findings

[22] We are in full agreement with the learned judge. We, too, find that a doubt had been cast in the manner found by the learned judge leaving the case

against the respondent not one that was proved on a standard which is beyond reasonable doubt.

[23] In coming to our decision, we are fully aware that when it comes to matters of discipline and what may or may not amount to misconduct or conduct that is not becoming of an advocate and solicitor in particular circumstances, it is "primarily for the members of the Bar to decide ... according to standards established by members of that honourable profession. Courts must necessarily exercise caution when entertaining an appeal in which the central question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise it will be the court and not the profession that will determine the yardstick of professional behaviour"; per Gopal Sri Ram JCA in *Gana Muthusamy v. Tetuan LM Ong & Co* [1998] 4 CLJ 878. His Lordship had cited with agreement the following passage in the guide to the professional conduct of solicitors that was issued by the Council of the Law Society as far back as 1974 and which reads as follows:

> One of the hallmarks of a developed profession is that it should lay down and maintain standards of professional conduct for its members based upon the best thinking of those members as to what constitutes proper conduct for a member of that profession.

[24] His Lordship added:

> In our judgment, a Court will be entitled to interfere only if what has been found by a Disciplinary Committee to be unprofessional conduct will not be considered to be such by the best thinking members of the profession.

[25] Lest it be misconstrued that the courts have abdicated all judgment to the profession itself, the contrary is the true position. In *Keith Sellar v. Lee Kwang Tennakoon & Another Appeal* [1980] 1 LNS 36; [1980] 2 MLJ 191, where the second of two questions posed for determination pertained to the correct burden of proof required in disciplinary proceedings, this was the answer of the Federal Court to that question:

> ... Looking at the grounds given in its statement of findings, the Disciplinary Committee although it made firm findings unfortunately did not say expressly what standard of proof it adopted in arriving at its decision.
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> First, what is the standard of proof required in such proceeding? Very recently, this Court in *Au Kong Weng v. The Bar Committee, State of Pahang* [1980] 2 MLJ 89 dealt with the same question and accepted the standard set by *Bhandari*'s case [1956] 3 All ER 742. Lord Tucker in that case approved the required standard established by the Court of Appeal in that in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for. The Court of Appeal also expressed the view that any body of professional men

A sitting in judgment on a colleague should not be content to condemn on a mere balance of probabilities.

The standard of proof required in a proceedings of this type is proof beyond reasonable doubt. In the judgment of this Court in *Au Kong Weng*'s case, the Chief Justice said:

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> It is a question for the committee to decide, first, whether the facts alleged in the charged had been proved beyond reasonable doubt and secondly whether the appellant in relation to those facts, was guilty of such conduct. The absence in the Committee's determination of any mention of the standard of proof does not justify an inference that it had failed to have regard to it.

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[26] This standard of proof beyond reasonable doubt was reiterated and followed in *Majlis Peguam Malaysia v. Cecil Wilbert Mohanaraj Abraham* [2019] 5 CLJ 139; *Dinesh Kanavaji Kanawagi & Anor v. Ragumaren N Gopal; Majlis Peguam (Intervener)* [2018] 2 CLJ 1; [2018] 2 MLJ 265; *Rosli Kamaruddin v. How Hock Sing & Anor* [2019] 1 CLJ 478; *Lembaga Tatatertib Peguam-Peguam v. Hoo Lin Coln & Anor* [2008] 4 CLJ 317; [2008] 4 MLJ 1.

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[27] Although the DC did not specifically express that it was subjecting the evidence before it to the standard of beyond reasonable doubt, it must nevertheless be shown that it had that standard in mind and was adhering to that standard. The learned judge subjected the decision and findings of the DC to that standard and found that it had fallen short. Her Ladyship gave her reasons at paras. [15] to [23] of her grounds of decision, and as highlighted above.

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[28] We have no reason to disagree with Her Ladyship and in fact agree with the approach taken and the decision reached. Nik Suhaidi's complaint ultimately was that Asmadi of Messrs Aziz & Associates had, without his consent, used a part of his monies to settle its own debts. The amount that was involved was a sum of RM76,000 which was admitted by Asmadi/the firm. This can be seen from the letter of complaint, the statutory declaration as well as the letter of claim.

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[29] In his letter of complaint, Nik Suhaidi said that Asmadi/the firm "telah menggunakan sebahagian wang baki pembelian rumah berkenaan untuk menyelesaikan hutang mereka TANPA persetujuan daripada pihak kami ... Bagi kami perbuatan pihak firma adalah sangat tidak professional dan beretika kerana telah melanggar amanah yang telah diberikan kepada mereka. Perbuatan mereka telah memberi banyak kesusahan kepada pihak kami dan juga kepada pihak pembeli."

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[30] In the statutory declaration, Nik Suhaidi elaborated that Asmadi had misconducted himself as follows:

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(i) Tidak membayar wang jualbeli rumah kepada saya mengikut tempoh yang ditetapkan.

(ii) Menggunakan wang berkenaan untuk tujuan peribadi Tanpa persetujuan saya.

(iii) Kelewatan proses jualbeli rumah diselesaikan sangat melampau,

(iv) Mengabaikan tuntutan saya melalui surat, panggilan telefon dan secara bersemuka.

[31] At para. 3 of his letter issued to the firm, Nik Suhaidi set out that the firm had admitted to using the sum of RM76,000 for the purpose of settling its debt to PKNS:

(3) Pihak Tuan telah mengakui menggunaan sebahagian dari jumlah wang tersebut sebanyak RM76,000.00 untuk melangsaikan hutang pihak tuan kepada pihak PKNS tanpa terlebih dahulu menghubungi pihak kami bagi tujuan tersebut.

[32] Asmadi in his reply had sought to explain that the sum was "borrowed" ("meminjam").

[33] These were the findings and recommendations of the DC as gleaned from its report, which findings and recommendations were accepted and confirmed by the DB:

THE COMMITTEE'S FINDINGS OF LIABILITY

The DC considers it appropriate to deal with allegation by R2 & R3 that they did not sign the AMBANK Remittance form [Appendix 10] (R2W1D4) and that their signatures had been forged. In the DC's view the following fact and circumstances need to be taken into account in considering whether DC can give any credence to the assertion by R2 & R3 that their signatures had been forged.

The DC's view is as follow:

(1) Needless to say the strongest point which R2 and R3 have in their favour is the evidence of the expert to the effect that in the expert's opinion, there are differences in the respective signatures of R2 & R3 as shown in their respective specimen as compared to the signatures which appear on the bank remittance Form (Appendix 10).

However the DC is mindful as stated earlier that in all fairness to the expert as readily admitted by him, his evidence is at best an opinion. He cannot say conclusively that R2 & R3's signatures had been forged.

(2) The DC is not merely puzzled but indeed highly dubious about the reason why R2 & R3 as responsible practitioners failed to close the AMBANK CA upon withdrawing themselves from the partnership on 1.5.2011. Did they actually withdraw from the partnership MESSRS ABDUL AZIZ & ASSOCIATES or did they continue to remain undisclosed partners controlling the AMBANK CA while ostensibly having joined Messrs Khairul A & Co as partners on 1.5.2011. There is preponderance of evidence to suggest that they

A continued to have control of the AMBANK CA of the Firm by reason of the fact that there were no less than 15 transactions involving their signatures to the AMBANK CA, 13 of them in the form of cheques withdrawing funds from the AMBANK CA and 2 in the form of Bank Remittance Application Forms for the remittance of fund from the AMBANK CA [at pages 11-14 of R3's B Bundle of Documents].

(3) Pertaining to The Bank's Remittance Form [Appendix 10], it is significant to note as pointed out by the Bar Council's submission that R2 & R3 only challenged their signatures on the Application for Remittance Form remitting the RM75,837.67 to PKNS but they had C completely failed to challenge their signatures on the other Remittance application Forms for the sum of RM65,000.00 [page 62 of the Record of Complaint], and the comparison of their signatures on both forms show beyond doubt that they are the same. Additionally they did not challenge their signatures drawn on the AMBANK CA withdrawing funds from the AMBANK CA after D 1.5.2011.

THE COMMITTEE'S RECOMMENDATION

After considering the circumstance and the evidence adduced by way of Written Statements, Documents and Submissions made by the BC, R1, R2, R3 & R5, the DC made the following findings:

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R2 was a Partner of the Firm and in the view of the DC he continued to remain so even though he ostensibly withdrew from the Partnership of Messrs Abdul Aziz & Associates to join Messrs Khairul A & Co on 1.5.2011 by reason of the fact that he continued to be one of the signatories to the Ambank CA. Therefore, he is F culpable for:

(a) The conversion of original complainant's funds in the Ambank CA to pay PKNS; and

(b) For the conversion of PKNS fund received into the Ambank CA.

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[34] From the above records, it is fair and reasonable to conclude that while the DC may have explained its findings, why it had rejected William Pang's evidence (that it was "at best an opinion" and that William Pang could not "say conclusively that R2 & R3's signatures had been forged"), it is clear that the DC did not address the evidence in terms of the standard of H proof. This is fortified when its next findings are examined - that because the respondent did not close the AmBank CA but remained undisclosed partners controlling the AmBank CA while ostensibly having joined Messrs Khairul A & Co as partners on 1 May 2011, and that the respondent had only challenged his signature on the application remittance form for I RM75,837.67 to PKNS and had "completely failed to challenge their signatures on the other remittance application forms for the sum of RM65,000 (p. 62 of the record of complaint and the comparison of their signatures on both forms show beyond doubt that they are the same. Additionally, they did not challenge their signatures drawn on the

AMBANK CA withdrawing funds from the AMBANK CA after 1 May 2011."

[35] From the above evaluation, it appears that the DC was putting the burden on the respondent to prove his innocence beyond reasonable doubt when the law is the other way round. The responsibility lies with the Bar Council, that it was for the DC to prove beyond reasonable doubt that the respondent had "misapplied client's money which is the balance purchase price derived from the sale and purchase agreement of the original complaint amounting to RM143,851.13 which the firm had received on 28 June 2013 together with late payment cost which was not disputed by the respondents." The evidence was clear that it was Asmadi who had not disputed the receipt and who had admitted to the "meminjam"; not the respondent.

[36] As far as the respondent was concerned, the question was whether it was his signature on the relevant application remittance form. William Pang had not only opined that there were differences between the impugned signature and the specimen signatures, he had also drawn a strong conclusion, that:

> ... there is very strong support for the proposition that the writer of the AJMAIN ABD RAHIM signatures on the specimen documents referred to in items S1 to S5 and SB-1 did not write the AJMAIN ABD RAHIM signature on the questioned document referred to in item Q1 compared to the support for the alternative proposition that another writer the questioned signature.

[37] Handwriting experts, like all experts are witnesses of opinion and views as opposed to being witnesses of fact. The DC is not or at least it was not established that its members have similar expertise or were capable of such reliable opinion. In any case, their opinion that the signatures of the respondent and one other partner on both forms show beyond doubt that they are the same is irrelevant as those forms are not the forms in contention. As observed by the learned judge, the finding of misconduct was focused on the admission of the misappropriation of RM76,000. It was "therefore not unreasonable for the applicant to only challenge the remittance form for the sum of RM76,000". Even the DC chose to decide on the issue of culpability based on the firm's admission to the misappropriation of this sum.

[38] We find that observation and conclusion of merit, wholly correct and sound.

[39] We further agree with the learned judge that there was nothing in the DC's report where it was recorded that William Pang "cannot say conclusively that the applicant's signatures had been forged", and how or the circumstances leading to the drawing of that conclusion. That statement, at para. 1 of the DC's findings of liability, appears as a view expressed by the DC on William Pang's evidence as opposed to a record of an admission or

A a statement to that effect by William Pang. The notes of William Pang's oral testimony were also not offered as proof of that statement.

[40] By contrast, there were the affirmative and strong conclusions of the expert as adverted to above, and as was pointed out by the learned judge.

B **[41]** In the face of such strong opinion, and bearing in mind the standard of proof to which all the evidence evinced at the disciplinary proceedings must be subjected to, it was proper for the learned judge to conclude that the expert report had created a doubt with regards to the respondent's signature on the impugned application remittance form, exh. R2W1D4. Since the C DC's finding on culpability relied on that exhibit, the learned judge reasoned that the DC's findings were now unsustainable, and the subsequent reliance by the DB clearly misplaced.

[42] We cannot agree more with the reasoning of the learned judge.

Conclusion

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[43] With respect, we were, therefore, not persuaded by the submissions of the appellant. We could not find any appealable error in the reasoning and the decision reached by the learned judge. The standard for finding culpability, that it is beyond reasonable doubt, as set down by the Federal E Court in *Keith Sellar* (*supra*) and in acknowledgment of the Bar's need for such standards in order to maintain the best and highest standard of good and proper conduct and professionalism, was not met by the DC and the DB in the facts and circumstances of this appeal. The learned judge was entirely correct in allowing the appeal of the respondent.

F **[44]** The appeal is consequently without merit and we unanimously dismissed the appeal with no order as to costs. The order of the High Court is affirmed.

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